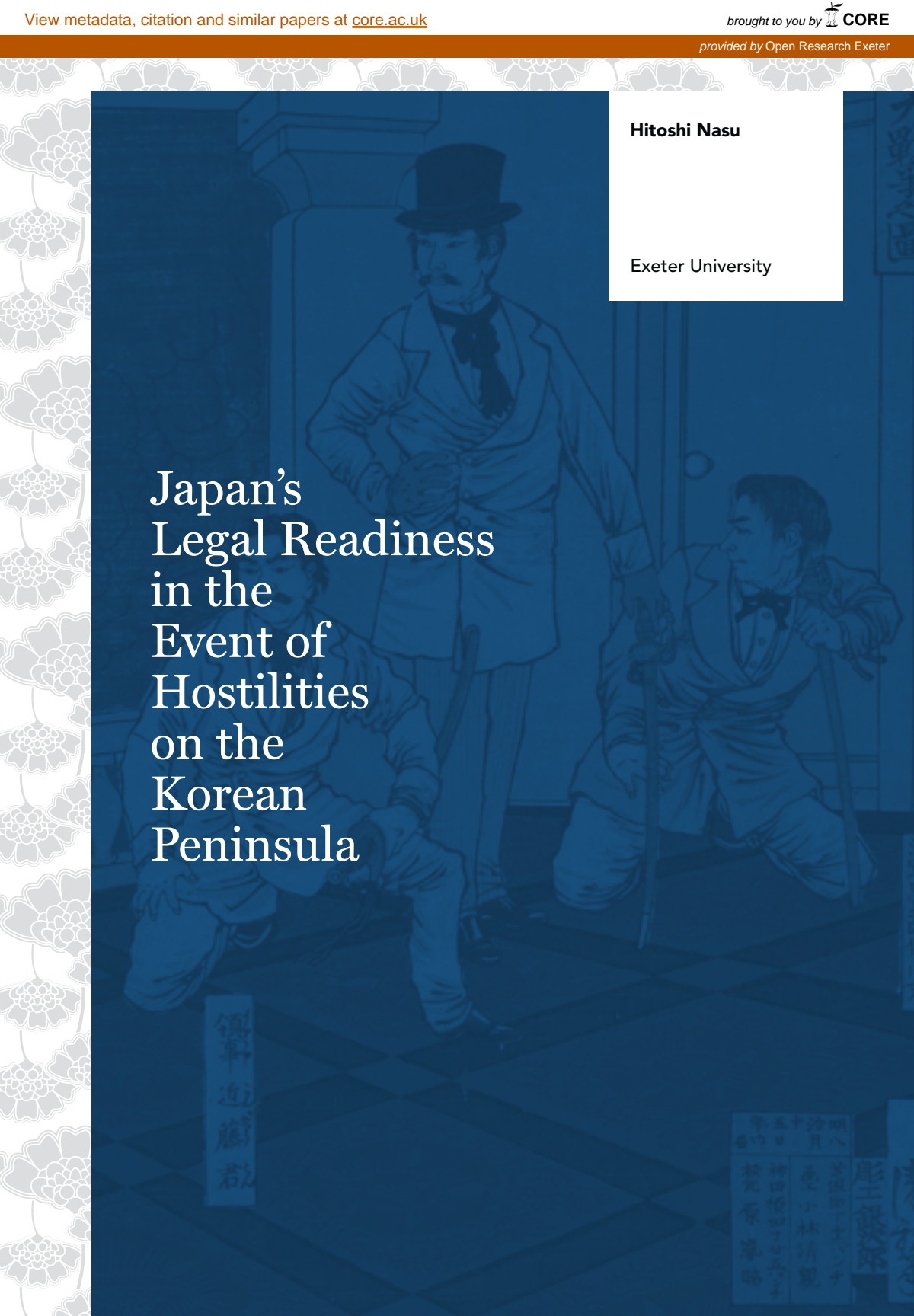


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Japan's Legal Readiness in the Event of Hostilities on the Korean Peninsula



Introduction

The use of military power is a controversial issue in Japan, primarily because of the “war renunciation clause” of the Japanese Constitution. Article 9 of the Constitution imposes restrictions on the extent to which the Japanese Self-Defense Forces (SDF) can operate overseas.¹ The issue of Japan’s use of armed force raised a public furor in 2015 when the new security bills were introduced as an attempt, ostensibly, to authorize the SDF to act in “collective” self-defense as a means to strengthen the U.S.-Japan alliance.² Despite the public outcry, the new security legislation was enacted on September 30, 2015 and came into force on March 29, 2016. The new legislation aimed to enable Japan to take a “seamless response” to any international security situation that might arise.³ In accordance with the “proactive contribution to peace” policy adopted by Prime Minister Shinzo Abe, the 2015 security legislation has achieved an overhaul of the Japanese security law regime that had, over time, developed as a patchwork of technical amendments and special legislation. Nevertheless, the security law of Japan still contains many legal gaps and uncertainties that prevent Japan from harnessing the full potential of the re-interpretation of Article 9 in the contemporary security environment.⁴

Since the entry into force of Japan’s new security legislation, tensions in Northeast Asia have significantly increased as the Democratic People’s Republic of Korea (North Korea) conducted aggressive missile and nuclear tests in 2017, while the U.S. President Donald Trump continued to post provocative messages alluding to the possibility of resorting to military action. Any eruption of hostilities on the Korean Peninsula—whether it be a small-scale “bloody nose” attack or full-blown warfare—will test Japan’s legal readiness under its overhauled security law regime, as well as its defense capabilities and the robustness of its emergency planning. This paper examines how the U.S.-Japan alliance operates within the legal framework for the use of force in terms of both international law and Japanese security law, in the event of an outbreak of hostilities on the Korean Peninsula.

After providing a brief review of the legal and political developments relevant to tensions on the Korean Peninsula, this paper outlines the legal framework for the use of force by the SDF. It then critically examines Japan's legal readiness to engage in combined security operations with U.S. forces, non-combatant evacuation operations, and maritime security operations in the event of hostilities on the Peninsula.

Legal and Political Developments relating to Security Tensions on the Korean Peninsula

Security tensions on the Korean Peninsula have primarily evolved around two inter-related military concerns: (i) the development of North Korea's nuclear weapons; and (ii) North Korea's ballistic missile capabilities. North Korea's nuclear weapons program has been an international concern since the country's announcement of its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons in 1993.⁵ Given the potential of ballistic missile systems to deliver nuclear, chemical or biological payloads,⁶ the level of global concern has increased considerably since July 2006 when North Korea began engaging in multiple ballistic missile launches.

Condemning the nuclear test conducted on October 9, 2006 as "a clear threat to international peace and security", the UN Security Council demanded that North Korea suspend and abandon all activities related to its ballistic missile program and all nuclear weapons programs in a complete, verifiable and irreversible manner,⁷ imposing sanctions in relation to specific items.⁸ On June 12, 2009, the Security Council adopted Resolution 1874 calling upon all states to inspect vessels on the high seas, with the consent of the flag state, in the event that vessels are suspected of violating the obligations imposed under the sanctions regime.⁹ A series of UN Security Council Resolutions and Presidential Statements have subsequently been issued each time North Korea conducted a nuclear test or a ballistic missile launch, reaffirming the obligations imposed upon North Korea in the previous resolutions and occasionally reinforcing the sanctions regime that has been built against it.¹⁰

The cause of tensions on the Korean Peninsula is not limited to armament issues alone. The hostile relationship between North Korea, the Republic of Korea (South Korea) and Japan continues to pose a threat to the region. On May 27, 2009, North Korea announced that it would no longer be bound by the 1953 Armistice Agreement that ended the Korean War. Even though the announcement was not considered sufficient to give rise to a resumption of an armed conflict,¹¹ it heralded a period of renewed hostilities. North Korea allegedly launched an

attack on March 26, 2010 which led to the sinking of the South Korean Navy vessel *Cheonan* with the tragic loss of 46 lives.¹² In November 2010, the island of Yeonpyeong near the disputed maritime border was bombarded, leaving two civilians and two soldiers dead. In August 2015, South Korea accused North Korea of planting land mines that injured two South Korean soldiers, which triggered an exchange of artillery fire in the demilitarized zone.

In addition, the humanitarian crisis facing North Korea has been a growing concern, with chronic malnutrition and systematic, widespread and grave violations of human rights drawing the attention of the international community.¹³ The crisis presents a precarious situation for the People's Republic of China (PRC), because of the possible mass influx of refugees across the border into the PRC in the event of hostilities on the Korean Peninsula. For Japan, the repatriation of Japanese nationals abducted by North Korea remains an important political consideration.

Tensions escalated rapidly in 2017 when North Korea was reported to have been edging close to acquiring the capability to launch a nuclear attack against the U.S. and President Trump threatened to unleash “fire and fury” against North Korea. The crisis was defused when North Korea made a historic commitment in 2018 to work towards complete denuclearization of the Korean Peninsula.¹⁴ However, the situation remains precarious due to the sluggish and difficult process of political negotiations, with the persistent risk that a breakdown in negotiations could potentially lead to military confrontation.

The Legal Framework for the Use of Force by the Self-Defense Forces

The operation of the SDF is subject to constraints under international law as well as Japanese domestic law, in particular under Article 9 of the Japanese Constitution. The use of force or threat of force is prohibited under international law,¹⁵ which is reflected in Article 9(1) of the Constitution. There are two exceptions to this principle under international law: (i) the authorization of the use of force by the United Nations; and (ii) the exercise of the inherent right of individual or collective self-defense.

While the Japanese Constitution does not explicitly recognize these exceptions, the “war-renunciation” clause must be interpreted in light of the applicable rules of international law, including the 1960 Treaty of Mutual Cooperation and Security between Japan and the United States,¹⁶ as prescribed under Article 98(2) of the Constitution.¹⁷ This means that notwithstanding the constitutional commitment not to maintain land, sea, and air forces, or other war potential under Article 9(2) of the Constitution, the clause must be read to allow

the SDF to engage in the use of force under United Nations authorization or in the exercise of the inherent right of individual or collective self-defense, so long as such force is limited to the minimum extent necessary to implement the UN mandate or to repel armed attacks. In other words, Article 9 of the Constitution does not entirely deprive Japan of justifications for the use of force available under international law, but rather limits the way in which, and the extent to which, the nation may engage in the use of force.

Under Japanese domestic law, the legislative bases for resorting to the use of armed force are restricted due to Article 9 of the Constitution. The primary legislative basis for resorting to the use of armed force is codified in Article 76 of the Law concerning the Self-Defense Forces (SDF Law),¹⁸ which authorizes the prime minister to direct deployment of SDF units in the event of an armed attack against Japan (i.e., an exercise of national defense power). Amendments introduced by the 2015 security legislation have expanded the scope of Japan's national defense power in cases where an armed attack occurs against a country that has a close relationship with Japan and, as a result, threatens Japan's survival and poses a clear danger that fundamentally undermines the lives and freedoms of its nationals and their right to pursue happiness (i.e., when there is an existential threat to Japan).¹⁹

In exercising the national defense power, the prime minister may authorize the SDF to use armed force to the extent necessary to defend the nation in accordance with Article 88 of the SDF Law.²⁰ The Defense Against an Armed Attack Law establishes procedural requirements that must be met in order for the prime minister to exercise this national defense power.²¹

The official Japanese government position that has traditionally been adopted is that an overseas deployment of SDF units for the purposes of the use of force in a foreign territory, its territorial sea or the airspace above it, is prohibited under the Constitution.²² This is because such action generally goes beyond the minimum level of force necessary for self-defense.²³ Prime Minister Abe reaffirmed this official position at the Budget Committee of the House of Counsellors on August 24, 2015, stating that the SDF's participation in combat operations in a foreign territory would amount to an overseas deployment prohibited under the Constitution.²⁴ This excludes the SDF's participation in the theater of combat in and around the Korean Peninsula in the exercise of the right of self-defense when hostilities have erupted.

This does not mean, however, that Japan is constitutionally prohibited from defending or assisting U.S. forces in the exercise of the right of collective self-defense. Upon the adoption of the U.S.-Japan Security Treaty in 1960 the official position of the Japanese government was essentially that Japan had the right of collective self-defense, but its exercise involving the use of force to defend other countries on foreign soil would exceed the minimum level of force necessary for self-defense.²⁵ In other words, Article 9 of the Constitution does not necessarily

prohibit Japan from exercising the right of self-defense as the legal basis for justifying SDF action in and around Japan to defend the U.S. and its interests when an armed attack occurs against the latter. The minimum level of force required for self-defense is not a static concept, but evolves over time as the geopolitical climate and technological capabilities change. In situations where the defense system of two nations is integrated to the extent that the survival of either nation is interdependent on the other's defense capabilities, it naturally follows that the line between individual and collective self-defense becomes blurred. Thus, the 2015 security legislation aimed to clarify that the SDF is not precluded from engaging in the use of force to defend and assist U.S. forces, including on the high seas—which are outside the jurisdiction of any foreign state.

Also, in cases where UN Command is engaged with a resumption of hostilities on the Korean Peninsula,²⁶ the Constitutional restriction does not prevent Japan from authorizing the deployment of the SDF. Japan indeed enacted special legislation to provide support activities in the Indian Ocean for military operations in Afghanistan and to engage in humanitarian and reconstruction support activities in Iraq.²⁷

Prior to making such a decision, however, questions might arise as to whether the U.S. assets in Japan can be deployed without prior consultation with Japan under the terms of the U.S.-Japan Security Treaty.²⁸ Notwithstanding Japan's official position ostensibly to the contrary, there is sufficient evidence to suggest that the U.S. does not believe prior consultation is required for the use of its military facilities and equipment in Japan, in the event of hostilities on the Korean Peninsula.²⁹ In any event, neither party to a bilateral treaty can be bound by any particular interpretation unless the other party is fully aware of such an interpretation and has accepted it as the shared understanding of the relevant treaty term.³⁰

In addition, the SDF is authorized under the SDF Law to use “weapons” in limited circumstances. This authorization for the use of “weapons” does not constitute a “use of force” as an exercise of national defense power as far as Japanese domestic law is concerned, even though it might constitute a “use of force” that requires legal justification under international law. For example, the use of weapons is authorized when it is necessary to:

- destroy ballistic missiles directed at Japan;³¹
- protect Japanese nationals and other designated foreign nationals in a foreign country;³²
- protect individuals under the SDF's control during a transport operation;³³
- protect SDF's defense assets;³⁴ and
- protect the defense assets of U.S. forces or other countries that contribute to the defense of Japan³⁵

In these situations, the legitimate use of weapons is permitted only to the

extent reasonable under the attendant circumstances and must not cause death or injury unless it can be justified as self-defense or necessity under Articles 36 and 37 of the Criminal Code of Japan.³⁶ Amendments introduced by the 2015 security legislation have expanded the scope within which the SDF personnel are authorized to use weapons. They are now allowed to protect not only themselves but also other individuals under their control or in the same compound, when engaging in support activities under grave circumstances affecting Japan's peace and security (e.g., when Japan might be subject to an armed attack if the situation were left unattended, but the SDF may operate only outside combat zones).³⁷

The decision as to which of these legislative bases might actually be used in the event of hostilities on the Korean Peninsula ultimately depends on the Japanese government's assessment of the attendant circumstances and various political considerations. This political decision will inform the SDF of the relevant legal framework for action. However, as will be explained below, each of these legislative bases is tightly regulated due to the constitutional limitation on the use of force and the controversies related thereto.

Legal Challenges in the Event of Hostilities on the Korean Peninsula

COMBINED SECURITY OPERATIONS

It is generally understood among security experts that key to the maintenance and enhancement of the U.S.-Japan alliance is Japan's legal readiness to effectively use the technological capabilities it has in a combined security operation to track missiles launched by North Korea.³⁸ Under the 2015 security legislation, there are three different legislative bases for the protection of U.S. forces by the SDF:

1. the protection of U.S. defense assets, with the limited use of weapons to the extent reasonable under the attendant circumstances;³⁹
2. the protection of individuals within the SDF's control during support activities under grave circumstances affecting Japan's peace and security (e.g., when Japan might be subject to an armed attack if the situation were left unattended, but the SDF may operate only outside combat zones);⁴⁰ and
3. the authorization of the use of force in situations where an armed attack occurs against a country that is in a close relationship with Japan and, as a result, threatens Japan's survival and poses a clear danger that fundamentally undermines the lives and freedoms of its nationals, and their right to pursue happiness (i.e., when there is an existential threat to Japan).⁴¹

The first two legislative bases allow SDF personnel to use weapons to a limited

extent within the law enforcement paradigm. This means that weapons can only be used to the extent reasonable to execute their mission (e.g., the protection of U.S. defense assets), and such use of weapons must not result in injury or death unless it is justifiable as self-defense or necessity under Articles 36 and 37 of the Japanese Criminal Code.⁴² On the other hand, the third legislative basis triggers the SDF's action in situations of national self-defense, with authority to use armed force to the extent necessary to repel armed attacks.

The first possible scenario where Japan might participate in a combined security operation with the U.S., in the event of hostilities on the Korean Peninsula, is when Japan recognizes itself as being subject to an armed attack or, in accordance with the new security legislation, when facing an existential threat resulting from an armed attack against the U.S.. Indeed, Prime Minister Abe observed during the 2015 Diet debate that the new security legislation would extend to the protection of U.S. Navy vessels from a missile attack launched by North Korea when those vessels form an integral part of Japan's missile defense system.⁴³ This statement indicates political readiness to invoke the national defense power under Article 76 of the SDF Law when hostilities on the Korean Peninsula threaten Japan's missile defense system and U.S. defense assets that form an integral part thereof. The decision might cause domestic controversy as to whether the missile attack amounts to an armed attack directed against Japan or whether the launch poses an existential threat to Japan, but in such a scenario, it can legitimately be justified as an exercise of the right of national self-defense under Article 51 of the UN Charter.

The alternative scenario could arise if Japan authorizes the SDF, in accordance with the Law Concerning Grave Circumstances, to undertake support activities for armed forces of other countries that are contributing to Japan's peace and security or to international peace and security. Operating within the law enforcement paradigm, the SDF's actions must comply with stringent regulations governing the use of weapons and are prohibited in areas where combat activities are taking place.⁴⁴ Nevertheless, during the Diet debate in August 2015, then Defense Minister Nakatani indicated that the SDF could defend a U.S. Navy vessel engaged in a combined security operation from an incoming missile attack by using a defensive missile under the new legislation concerning grave circumstances affecting Japan's peace and security.⁴⁵

Under international law, however, such action clearly constitutes a use of force that requires justification based on the right of self-defense or UN authorization. It is widely accepted that force may be used in law enforcement provided that such force is unavoidable, reasonable and necessary for the purpose of effecting the objects of law enforcement such as boarding, searching, seizing and bringing into port a suspected vessel.⁴⁶ Defending a foreign warship goes beyond the strict limitation imposed upon the use of force in maritime law enforcement

under international law and can only be justified as an exercise of the right of collective self-defense or as an action under UN authorization.

An attempt to justify the SDF's actions to defend U.S. Navy vessels based on the Law Concerning Grave Circumstances thus creates a legal paradox—it is a law enforcement action under Japanese domestic law, but the same conduct constitutes a use of force under international law that requires justification as an exercise of the right of collective self-defense. Even though the public debate concerning the 2015 security legislation focused on the constitutionality of the right of collective self-defense, the actual scope of the use of force newly authorized is so narrowly confined that it does not support a clear case of collective self-defense.

NON-COMBATANT EVACUATION OPERATIONS (NEO)

Prior to and in the event of hostilities on the Korean Peninsula, Japan and the U.S., among many other countries, will be involved in rescue and evacuation operations for the relocation to a place of safety of designated non-combatants, namely their own nationals and other designated foreign nationals residing in South Korea. Although each state is responsible for the development and execution of its own national evacuation plan, multiple states are likely to coordinate their rescue efforts according to their own legal framework and operational capabilities. Coordination with other states will help optimize limited assets available for the evacuation of foreign nationals. However, the requirement of consent as the legal basis for the SDF's deployment within South Korean territory would necessarily constrain the SDF's ability to facilitate and carry out rescue and evacuation operations. Japan's legal position is that rescue and evacuation operations must be conducted with the consent of South Korean authorities or, alternatively, under UN authorization.⁴⁷ In other words, the SDF's overseas rescue missions are strictly prohibited without consent of the host state or UN authorization. Also, its ability to use weapons necessary to perform rescue and evacuation operations is restricted to areas where no combat is taking place.⁴⁸ The United States, on the other hand, merely requires that "the NEO planners are aware of sovereignty of other foreign nations and the constraints and restraints on violating the sovereignty".⁴⁹ Under international law, the legality of the use of force by a state to protect its own nationals in a foreign state without consent of the latter is far from established, due to inconsistent and equivocal state practice.⁵⁰

The use of force necessary to protect Japanese and foreign nationals from attacks or the effects of attacks is one of the critical areas in which the SDF's ability to facilitate rescue and evacuation operations will be restricted unless South Korean authorities are prepared to provide an express consent thereto. This is a particularly acute area of concern for political reasons (e.g., the territorial dispute over Dokdo/Takeshima, among others), as well as historical reasons (e.g., Japan's occupation of the Korean Peninsula and forced labour during World War II). Due

to these concerns, South Korea would likely be reluctant to allow the SDF to engage in any military operation on its soil.

During a rescue and evacuation operation, any engagement between the SDF and members of North Korean forces, militia or voluntary corps, or anyone acting under the direction and control of the North Korean regime, would constitute hostilities in an international armed conflict. In such a situation, the SDF would be required to comply with the full range of rules under international humanitarian law, including the law of targeting, and would not be able to circumvent its obligations by asking other states to intervene. It follows that the SDF are under the obligation to verify legitimate military targets, to exercise all feasible precautions to minimize collateral damage, and to refrain from or stop executing an attack if it is reasonably expected to cause excessive collateral damage relative to the concrete and direct military advantage anticipated.⁵¹ Furthermore, Japan will be required to respect and ensure respect for international humanitarian law,⁵² arguably with the positive obligation to take action when the SDF have the capabilities and opportunities to prevent or stop war crimes being committed.⁵³ As such, the SDF cannot disregard relevant rules of international law applicable to an international armed conflict, even if they participate in rescue and evacuation operations with the consent of South Korean authorities. These rules apply in parallel to Japanese domestic law regulating the conduct of the SDF and within the parameters of the consent provided by South Korean authorities. These legal complexities, as well as associated legal risks, must be carefully assessed before the deployment of the SDF to complex operational environments that are expected to develop during rescue and evacuation operations.

MARITIME SECURITY OPERATIONS

The maritime domain is likely to be another major theater in which the SDF must operate. In the event of hostilities, civilians and defectors are likely to flee hostilities in large numbers by seeking refuge through maritime routes or by crossing the border into the PRC. Among those fleeing could be North Korean operatives on a covert mission to sabotage search and rescue operations at sea or infiltrate South Korean or Japanese territories. Depending on how the PRC and Russia engage with such hostilities, their navy vessels could be present in the vicinity of the maritime routes used by asylum seekers. These factors complicate the maritime conditions under which SDF vessels might be required to operate in facilitating the evacuation of Japanese and foreign nationals or their protection from hostilities.

First, the SDF could face a situation where the obligation to assist people in distress arises under the law of the sea or international human rights law. Japan has ratified the 1982 UN Convention on the Law of the Sea and the 1974 International Convention for the Safety of Life at Sea, which requires the master of a ship to render assistance to persons in distress.⁵⁴ Japan is also a party to the International

Covenant on Civil and Political Rights, which arguably imposes on it positive obligations to protect the right to life at sea within its jurisdiction.⁵⁵ Depending on how wide the scope of jurisdiction is interpreted for the purposes of applying the Covenant, the SDF may be required to protect the human rights of any individuals with whom it comes into contact at sea, for example, those on board any ships which SDF personnel visit and search to verify their nationality.⁵⁶ These obligations include non-refoulement when there are substantial grounds to believe that the relevant individuals would face a real risk of being persecuted or subject to torture and cruel, inhuman or degrading treatment upon return.

Second, further complication might arise when hostile actors, with the intent to engage in subversive activities and disrupt evacuation operations, disguise themselves as asylum seekers or civilians on merchant vessels. SDF vessels may be authorized to inspect foreign-flagged ships, with the consent of the flag state, when the situation is recognized as constituting grave circumstances affecting Japan.⁵⁷ Alternatively, the SDF may be authorized to use armed force in the exercise of national defense power under Articles 76 and 88 of the SDF Law in response to an armed attack directed against Japan or its close ally. Yet, the application of national defense power to maritime security operations in such a scenario depends upon whether subversive activities form part of the larger context of the armed attack to which the SDF are responding. Likewise, the applicability of international humanitarian law in such a scenario also depends on whether the subversive activities form part of the larger context of hostilities. When their identity or link to the larger context of hostilities is unclear, the SDF would face a legal “grey zone” due to uncertainty as to which body of international law applies to the use of force (including weapons) and to the treatment of hostile actors who are captured.⁵⁸

Third, Article 9 of the Constitution restricts the ways in which the SDF may engage in hostilities in the maritime context. The explicit denial of the right of belligerency in the second paragraph of the war-renunciation clause imposes not only stricter requirements on the justification for the use of force (under *jus ad bellum*) but also precludes Japan from engaging in certain types of belligerent acts that are traditionally permitted for the navy (under *jus in bello*). Therefore, without prejudice to any UN-authorized maritime enforcement operations, there are constitutional limitations on the extent to which the SDF may participate in naval operations such as naval blockade, interdiction of neutral ships, seizure of enemy ships, or employing naval mines in foreign territorial waters.⁵⁹

Conclusion

In the event of hostilities on the Korean Peninsula, there will be many scenarios where Japan is required to consider use of force options—such as defending U.S. navy vessels engaged in combined security operations, protecting Japanese and foreign nationals during rescue and evacuation operations, and engaging in various maritime security operations—either by stretching the meaning of an existential threat or by an expansive reading of the permitted use of weapons during support activities within the law enforcement paradigm. The benefit of such an attempt to stretch the legislative grounds for justifying specific use of physical force must be weighed against its political, diplomatic, constitutional and operational ramifications. As examined above, the constraints of the legislative framework limit Japan's legal options to justify the use of force in prosecuting various missions in the event of hostilities on the Korean Peninsula.

Even though the 2015 security legislation aimed to enable Japan to adopt a “seamless response” to contemporary security threats, it did not go far enough to address the inherent gap in Japan's security law regime so as to allow the SDF to employ armed force as necessary in a variety of settings. This problem is not unique to SDF's operations in and around the Korean Peninsula, but applies equally to hostilities in Taiwan and other parts of Asia. For the U.S.-Japan alliance to remain as the anchor of regional security in the Asia-Pacific, the U.S. and Japanese defense agencies will have to work together to develop a mutual understanding of legally defensible options for each country in a wide range of operational scenarios that are expected to arise in the event of hostilities in the region. ■

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- 1 Article 9 of the Constitution reads: "(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized." Constitution of Japan, art. 9.
- 2 Cabinet Bill No. 72 of the 189th Diet (Japan); Cabinet Bill No. 73 of the 189th Diet (Japan).
- 3 Law No. 76 of 2015 (Japan); Law No. 77 of 2015 (Japan).
- 4 For the author's analysis of the 2015 security legislation, see Hitoshi Nasu, *Japan's 2015 Security Legislation: Challenges to its Implementation under International Law*, 92 Int'l L. Stud. 249 (2016).
- 5 Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161. See also Int'l Atomic Energy Agency [IAEA], *Report of the Implementation of the Agreement between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. Gov/2636 (Feb. 25, 1993).
- 6 S.C. Res. 1695, pmb. ¶ 4 (July 15, 2006).
- 7 S.C. Res. 1718, ¶¶ 5–7 (Oct. 14, 2006).
- 8 *Id.*, ¶ 8.
- 9 S.C. Res. 1874, ¶¶ 11–13 (June 12, 2009).
- 10 See, e.g., S.C. Res. 2397 (Dec. 22, 2017); S.C. Res. 2375 (Sep. 11, 2017); S.C. Res. 2371 (Aug. 5, 2017); S.C. Res. 2321 (Nov. 30, 2016); S.C. Res. 2270 (Mar. 2, 2016); S.C. Res. 2094 (Mar. 7, 2013); S.C. Res. 2087 (Jan. 22, 2013); Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/13 (Apr. 16, 2012).
- 11 For commentaries, see Dapo Akande, *The Korean War Has Resumed!! (Or So We Are Told)*, EJIL: Talk! (July 22, 2009), <http://www.ejiltalk.org/the-korean-war-has-resumed-or-so-we-are-told/>; Seunghyung Sally Nam, *Has North Korea Terminated the Korean Armistice Agreement?*, EJIL: Talk! (July 24, 2009), <http://www.ejiltalk.org/has-north-korea-terminated-the-korean-armistice-agreement/>.
- 12 See Statement by the President of the Security Council, U.N. Doc. S/PRST/2010/13 (July 9, 2010).
- 13 See U.N. Human Rights Council, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63 (Feb. 7, 2014).
- 14 The White House, Joint Statement of President Donald J Trump of the United States of America and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit ¶ 3 (2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>; Repub. of Kor. Ministry of Foreign Affairs, Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula (2018), <http://www.mofa.go.kr/viewer/skin/doc.html?fn=2018091804122336&rs=/viewer/result/20191>.
- 15 U.N. Charter art. 2(4). Its status as customary international law has been confirmed by the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)*, Merits, 1986 I.C.J. Rep. 14, ¶¶ 99–101, 188–90 (June 27).
- 16 Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509.
- 17 Article 98(2) of the Constitution reads: "The treaties concluded by Japan and established laws of nations shall be faithfully observed." Constitution of Japan, art. 98(2).

This by no means suggests any normative hierarchy between international law and Japanese domestic law, but simply provides a constitutional basis for the interpretative principle. See Hitoshi Nasu, *Article 9 of the Japanese Constitution: Revisited in the Light of International Law*, 19 J. Japanese L. 50 (2004).

18 Law No. 165 of 1954 (Japan) [hereinafter SDF Law].

19 Law No. 76 of 2015, *supra* note 3, arts. 1, 5.

20 The use of armed force must comply with the relevant rules and customs of international law and must not exceed what is considered reasonable under the attendant circumstances. SDF Law, *supra* note 18, art. 88(2).

21 Law No. 79 of 2003 (Japan).

22 Resolution against Overseas Deployment of the Self-Defence Forces, adopted at the House of Councillors, 19th Diet Sess. (1954).

23 See Takeshi Nakano (仲野武志), *Buryoku Kōshi Buki Shiyō no Hōteki Kisei (II) (武力行使・武器使用の法的規制 (二))* [The Legal Regulation of the Use of Force/ Use of Weapons (II)], 93(10) Jichi Kenkyū (自治研究) [Autonomy Stud.] 49, 56–57 (2017).

24 Remarks before the Budget Committee of the House of Counsellors, 189th Diet Sess. Official Record of Proceedings, No. 20, at 12 (Aug. 24, 2015).

25 See, e.g., Prime Minister Nobusuke Kishi, Remarks before the Special Committee of the House of Representatives on the Japan-U.S. Security Treaty and Other Matters, 34th Diet Sess. Official Record of Proceedings, No. 21, at 27, 31, 33–34, (Apr. 20, 1960); Remarks before the Budget Committee of the House of Councillors, 34th Diet Sess. Official Record of Proceedings, No. 23, at 24, 27 (Mar. 31, 1960); Masami Takatsuji, Dir. of Cabinet Legislative Bureau, Remarks before the Budget Committee of the House of Councillors, 61st Diet Sess. Official Record

of Proceedings, No. 5, at 12 (Mar. 5, 1969). The official position has since then been simplified with reference to the exercise of the right of collective self-defense more generally, but without clarifying whether the exercise of the right envisaged is limited to overseas deployment or more broadly includes assistance in and around Japan. See, e.g., Prime Minister Zenko Suzuki, Response to House Member Seiichi Inaba (May 29, 1981). See also Takahiro Suzuki (鈴木尊紘), Kenpō dai 9-jō to Shūdantekijieiken (憲法第9条と集団的自衛権) [Article 9 of the Constitution and the Right of Collective Self-Defence], 11 Reference 2, 37–40 (2011); Kiyoshi Sakaguchi (坂口規純), Shūdantekijieiken ni Kansuru Seifu Kaishaku no Keisei to Tenkai (I) (集団的自衛権に関する政府解釈の形成と展開 (上)) [The Formation and Development of Government Interpretation Regarding the Right of Self-Defence (I)], 1330 Gaikou Jihou (外交時報) [Dipl. Rev.] 70, 79–84 (1996).

26 The U.N. Command in Korea has continued to operate since its establishment under S.C. Res. 84, ¶ 3 (July 7, 1950) to preserve the 1953 Armistice Agreement and to maintain control of U.N. Forces. Sixteen nations that contributed troops pledged that they should be “united and prompted to resist” if there was a renewal of the armed attack: Joint Policy Declaration Concerning the Korean Armistice, July 27, 1953, 4 U.S.T. 230, T.I.A.S. No. 2781.

27 Law No. 113 of 2001 (Japan) (expired in 2007 after extended three times); Law No. 137 of 2003 (Japan) (expired in 2009 after extended once).

28 Prior consultation is required for any military use of facilities and areas in Japan for the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, except when the U.S. takes action in self-defence under Article V of the U.S.-Japan Security Treaty. See *Exchange of Notes Regarding the Implementation of Article VI of Treaty of Mutual Cooperation and Security between Japan and the United States of America*, 42 Dep’t St. Bull. 198 (1960) (in which both

parties shared understanding that “[m]ajor changes in the deployment into Japan of United States armed forces, major changes in their equipment, and the use of facilities and areas in Japan as bases for military combat operations to be undertaken from Japan *other than those conducted under Article V of the said Treaty*, shall be the subjects of prior consultation with the Government of Japan”) (emphasis added).

29 For details, see Kazuya Sakamoto (坂元一哉), *Nichibeidōmei no Kizuna* (日米同盟の絆) [The Bonds of the Japan-U.S. Alliance] 257–66 (2000).

30 See *Kasikili/Sedudu Island* (Bots. v. Namib.), Judgment, 1999 I.C.J. Rep. 1045, ¶ 74 (Dec. 13); *Dispute between Argentina and Chile concerning the Beagle Channel*, 21 R.I.A.A. 53, ¶ 169 (Perm. Ct. Arb. 1977).

31 SDF Law, *supra* note 18, arts. 82.3, 93.3.

32 *Id.* arts. 84.3, 94.5.

33 *Id.* arts. 84.4, 94.6.

34 *Id.* art. 95.

35 *Id.* art. 95.2 (as amended by Law No. 76 of 2015).

36 Law No. 45 of 1907 (Japan).

37 Law Concerning Measures to Ensure Peace and Security of Japan in Situations that Constitutes Grave Circumstances Affecting Japan, Law No. 60 of 1999, as amended by Law No. 76 of 2015 (Japan) [hereinafter Law Concerning Grave Circumstances], arts. 1, 2(3), 11; SDF Law, *supra* note 18, arts. 84.5, 94.7.

38 Report of the Advisory Panel on the Reconstruction of the Legal Basis for Security 7 (2008), <http://www.kantei.go.jp/jp/singi/anzenhosyou/houkokusho.pdf>.

39 SDF Law, *supra* note 18, art. 95.2.

40 Law Concerning Grave Circumstances, *supra* note 37, arts. 1, 2(3), 11; SDF Law, *supra* note 18, arts. 84.5, 94.7.

41 SDF Law, *supra* note 18, arts. 76, 88.

42 Law No. 45 of 1907 (Japan).

43 Remarks before the Budget Committee of the House of Counsellors, *supra* note 24, at 12.

44 Law Concerning Grave Circumstances, *supra* note 37, art. 2(3).

45 Remarks before the Special Committee of the House of Councillors on the Bills for Peace and Security of Japan and the International Community, 189th Diet Sess. Official Record of Proceedings, No. 11, at 5 (Aug. 21, 2015).

46 *Dispute Concerning Delimitation of the Maritime Boundary between Guyana and Suriname* (Guy. v. Sur.), Award, 30 R.I.A.A. 1, ¶ 445 (Perm. Ct. Arb. 2007); *M/V Saiga* (No. 2) (St. Vincent and the Grenadines v. Guinea), Judgment of July 1, 1999, 3 ITLOS Rep. 10, ¶ 155; *Fisheries Jurisdiction* (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 432, ¶ 84 (Dec. 4); S.S. “I’m Alone” (Can. v. U.S.), Final Award, 3 R.I.A.A. 1609, 1617 (Perm. Ct. Arb. 1935). See also Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 22(1)(f), Dec. 4, 1995, 2167 U.N.T.S. 3.

47 SDF Law, *supra* note 18, art. 84.3(2).

48 *Id.* art. 84.3(1).

49 U.S. Joint Chiefs of Staff, Joint Publication 3-68 on Noncombatant Evacuation Operations, Appendix B Legal Considerations ¶ f(2) (2015).

50 See, e.g., Tom RuyRuys, ‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice 213–43 (2011).

51 Note that the SDF would also be subject to South Korean jurisdiction unless Japan has concluded a status of force agreement with South Korea with a view to enabling the SDF to operate without facing criminal liability for their actions during rescue and evacuation operations.

52 Common Article 1 to the Convention for The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. For the customary international law status, see Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law r. 139 (2005), as updated by the International Committee of the Red Cross (ICRC) at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

53 Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ¶¶ 169–72 (Knut Dörmann, Liesbeth Lijnzaad, Marco Sassòli & Philip Spoerri eds., 2016).

54 United Nations Convention on the Law of the Sea art. 98(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]; International Convention for the Safety of Life at Sea ch. V, Regulation 10(a), Nov. 1, 1974, 1184 U.N.T.S. 278.

55 International Covenant on Civil and Political Rights arts. 2, 6, Dec. 16, 1966, 999 U.N.T.S. 171.

56 LOSC, *supra* note 54, art. 110. Cf. Medvedyev and Others v. France, App. No. 3394/03, Eur. Ct. H.R. ¶ 67 (2010) (determining that the non-flagged vessel *Winner* and its crew were within the jurisdiction of France for having exercised, *de facto*, full and exclusive control over them).

57 Law Concerning the Implementation of Ship Inspection Activities in Situations that Constitute Grave Circumstances Affecting Japan, Law No. 45 of 2000 (Japan), arts. 2, 6 (amended by Law No. 76 of 2015).

58 For the author's analysis of the challenges posed to the implementation of international humanitarian law by hybrid warfare employed in the maritime context, see Hitoshi Nasu, *Challenges of Hybrid Warfare to the Implementation of International Humanitarian Law in the Asia-Pacific*, in Asia-Pacific Perspectives on International Humanitarian Law 220 (Suzannah Linton, Tim McCormack & Sandesh Sivakumaran eds., 2019).

59 See, e.g., Masasuke Ohmori, First Dir. of Cabinet Legislative Bureau, Remarks before the Special Security Committee, 120th Diet Sess. Official Record of Proceedings, No. 5, at 26 (Mar. 13, 1991).